Older and Later Elements in the Code of Hammurapi.[1]—By Morris Jastrow, Jr., Professor in the University of Pennsylvania.

I.

The discovery in the course of excavations at Susa in December, 1900, of the large diorite stele containing the elaborate code of laws collected and promulgated by King Hammurapi in the early years of his reign (2123-2081 B. C.) furnishes a definite measure for gauging the state of society in Babylonia in the third millennium before this era, and in so far as the execution of justice reflects the stage reached in the process of civilization, it permits also of a comparison with general conditions prevailing in subsequent periods. As a result of the detailed study given to this remarkable monument by many scholars since its discovery,[2] the interpretation may be said to have been completed, although there still remain quite a number of technical terms and phrases in the code in regard to which agreement has not as yet been reached. In addition to this the general principles guiding the order of subjects treated in the code and the arrangement of subdivisions within larger sections of the code that may be distinguished have been ascertained, thanks largely to the keen researches of one of our own members, Professor Lyon.[2] There still remains, however, the problem of tracing the process which led to the final codification of the laws, for it is obvious that such a compilation as Hammurapi undertook presupposes a long antecedent process in the perfection of a method of dispensing justice in the course of which, with the growing complications of advancing social conditions, the established practice—and law in its beginning is merely traditional or conventional practice—would be subject to modifications in order to adapt them without abandonment of the underlying

[1] Presidential address before the American Oriental Society, April 9th, 1915, in New York City. See the bibliography in Johns, *The Relations between the Laws of Babylonia & the Laws of the Hebrew Peoples* (London, 1914), pp. 65-76.

[2] See especially Lyon's paper in the *Journal of the American Oriental Society*, Vol. XXV, pp. 248-265.

principles to later conditions. It is to this aspect of the code to which I should like to direct attention.

That Hammurapi was not the first to make the attempt at putting the laws of the land together has, of course, been recognized. The expression used by him at the close of the long introduction to the code (col. V. 20-22) "I established law and justice in the language of the land (*ina pî mâtim*)" shows, as was first pointed out by Dr. Lyon,[3] that Hammurapi's chief merit lay in promulgating a code in Semitic or Akkadian form as the official language of the new empire founded by him. In confirmation of this, fragments of a Sumerian code have now turned up which represent the prototype, if not the actual original of the laws in the Semitic code.[4] Furthermore, we have the express testimony of an early ruler of Lagash, Urukagina (c. 2700 B. C.), to the reforms in temple fees and in taxes instituted by him as well as to his endeavors to regulate abuses in commercial transactions and even to abolish polyandry.[5] His aim in his reforms is, as he expressly states, "that the powerful may not injure the orphan and the widow,"[6] much as Hammurapi declares the general purport of his code to be to restrain "the strong from oppressing the weak, and to secure justice for the poor and the widow."[7] The language used by Urukagina in describing his various reforms shows that he put them in the form of laws and we are, therefore, justified in carrying back the codification of laws in the Euphrates Valley to at least five centuries before Hammurapi, and no doubt the period can be moved still further back.

II.

We also have the evidence that legal practice—as is natural—was subject to change in ancient Babylonia. This is shown not only by deviations in the business and legal documents from the stipulations in the Hammurapi code, but by a comparison

[3] J.A.O.S., XXV, p. 270.

[4] See Clay in the *Orientalistische Litteraturzeitung,* 1914, pp. 1-3. [The Yale fragment of the Sumerian code now published by Clay in *Yale Oriental Series, Babylonian Texts* I (New Haven, 1915). No. 28.]

[5] de Sarzec, *Découvertes en Chaldée* Partie Epigraphique p. L and repeated with variations in three other texts, *ib.* pp. L to LII; see also Thureau-Dangin, *Sumerisch-Akkadische Königsinschriften,* pp. 44-56.

[6] *Ib.,* Inscription B-C, col. XII, 22-23.

[7] Col. XL, 59-62.

for the period before Hammurapi of the so-called "Sumerian family laws" first investigated by our fellow-member Professor Haupt many years ago.[8] Now, in view of the fact that five columns in the code are missing,[9] we cannot, of course, be absolutely certain that the code did not contain the laws setting forth—as in the fragment of the "Sumerian Family Laws"—the regulations (a) in case a son cuts himself loose from father or mother, or (b) when a father or mother desires to disinherit a son or (c) when a wife cuts herself loose from her husband or (d) when a husband divorces his wife, or (e) when a hired slave dies or is lost or runs off or is taken, or falls sick, but since we do know from other sources[10] the character of some of the laws set forth in the missing portion, taken in connection with the systematic arrangement of the subjects comprised in the code, it is not likely that any of the cases dealt with in the above enumeration were taken up before § 127 which begins the large subdivision extending to § 194, covering marriage, dowry, divorce, desertion, adoption, disinheritance, adultery, incest and other subjects that may be broadly grouped under "family laws." Moreover, we have within this subdivision at least two legal decisions which furnish a basis of comparison with the "Sumerian" laws and point to a decided variation from the latter. §§ 168-169 read "if a father determines to disinherit his son, and says to the judge 'I disinherit my son', but upon an examination on the part of the judge it appears that the son has not committed a crime to justify the disinheritance, the father may not disinherit his son." If we contrast this with the third paragraph in the 'Sumerian Family Laws,' to wit,[11] "if a father says to his son, 'thou art not my son,' he must leave house and wall" (i. e., he has no further share in the estate), we note in the code the advance to a condition in which the paternal authority is definitely curbed as against the absolute control in the other instance. The code

[8] *Die Sumerischen Familiengesetze* (Leipzig, 1879), appearing as part of a large collection of Sumerian paradigms, phrases, etc. See Rawlinson V, Pl. 25.

[9] Intentionally erased by the Elamitic conqueror, who carried the precious monument as a trophy to Susa, and who, no doubt, had intended to write his own inscription, glorifying his deeds, on the erased portion.

[10] Meissner, *Altbabylonischegesetze,* in *Beitrage zur Assyriologie,* III, pp. 493-523.

[11] V Rawlinson, Pl. 25, col. II, 34-39.

not only provides a legal procedure for the proposed act of disinheritance by obliging the father to go before a judge, but the court examines into the matter and, if it does not find sufficient cause, restrains the father from carrying out his intention. More than this and by way of further restriction of parental authority, a supplementary stipulation (§ 169), which we may regard as a still later decision, provides that even if a sufficient cause is found, the first offense must be forgiven, and only in case of a repetition of the offense does the court consent to the disinheritance. The conclusion is justified, therefore, that the "Sumerian family laws" reflect an older practice which has passed away, without, however, the abandonment of the underlying principle that the father has the right to disinherit his son,—only that he must show cause for exercising his authority.

The old expressions 'thou art not my father' and 'thou art not my mother' are still retained in the code (§ 192) as formulae to denote the throwing off of parental authority, but only in the case of children of doubtful station[12] who have been adopted. In such a case, the parental authority is absolute and the punishment prescribed for the one who rebels against this authority is the excision of the tongue—which as a punishment is evidently a survival of very early days. The phrases in question, thus restricted to cases where the once generally acknowledged absolute parental authority is still retained, are in themselves further proof of the changes which legal procedure and practice underwent in ancient Babylonia.

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[12] Namely the Ner-Se-Ga, rendered by Winckler and Mueller "prostitute" and by Ungnad-Kohler as 'Kaemmerling, but who appears to have been originally a person of low station—perhaps born in the palace and pressed into palace service—rising in the course of time to a higher station as a guard (*manzaz pâni*) Bruennow, *Classified List* No. 9201 or *muzâz êkalli* ("palace guard"), according to the explanatory addition in § 187. (See the passages quoted by Meissner, *Assyrische Studien* IV, p. 12.) In this capacity the Ner-Se-Ga is not infrequently mentioned in legal tablets, e. g., Meissner, *Altbabylonisches Privatrecht* No. 100, 32. That the Ner-Se-Ga in the code is looked upon as occupying a low social grade is indicated by the juxtaposition (§§ 187 and 192) with *mar Sal zikru*, i. e. "the son of a public woman," literally 'the woman belonging to any man.' That the Ner-Se-Ga and the *mar Sal zikru* designate offspring of doubtful origin is further shown by § 193 which stipulates that if either the one or the other finds out his origin, and through a distaste for his foster-parents returns to his father's house, his eye shall be plucked out.

Equally suggestive is the comparison of § 142 of the code, the case in which a woman declines to have sexual relations with her husband, with the fifth paragraph of the Sumerian family laws. The latter reads "If a wife gets a distaste (*izîr*)[13] for her husband and says 'thou art not my husband,' they shall throw her into the river." This is a simple as well as an absolute procedure, in contrast to the corresponding paragraph in the code (§ 142) which reads:

"If a woman gets a distaste (*izîr*) for her husband and says 'Thou shalt not have me,' (and) if on subsequent inquiry it appears that she has been careful of herself,[14] without sin, whereas her husband has gone about and neglected her, that woman is without blame. She shall receive her dowry[15] and return to her father's house." The old law, however, remains in force, in case it turns out that the woman has not been careful, has gone about and ruined her house and neglected her husband. In that case (§ 143) "they shall throw her into the water." The advance in the social status of the married woman and corresponding legal procedure is indicated by the provision that an inquiry is instituted, which may result in justifying the wife's aversion, whereas the older law gives her no right, whatsoever, against her husband's will. Incidentally, also, the substitution of the phrase of "thou shalt not have me" instead of the older one "thou art not my husband" is an illustration of the change, pointing to her right under the later procedure to actually reject her husband. There is no longer any presumption of her being rebellious in case her

[13] Professor Haupt (*Zeits. für Assyr.* XXX, p. 93) has shown that the term has reference to a refusal on the part of the wife to have sexual intercourse with her husband.

[14] i. e., has not given herself to anyone else.

[15] *Šeriktu* "gift," which designates the marriage settlement made by the father of the bride and given to the bridegroom, in contrast to the *tirḫatu* which is the gift given by the bridegroom to the bride's father. The latter is a survival of marriage by purchase, the former originally the wages of the daughter for services rendered her father as long as she was unmarried, given on leaving her father's house but turned over to the husband as the owner of his wife. The *šeriḳtu*, evidently, represents a later practice, belonging to a period when the parental authority over his children was curbed to the extent that he was obliged to compensate his daughter for services rendered. See Jastrow, *Civilization of Babylonia and Assyria*, Philadelphia, 1915, p. 306. A third term, *nudunnu*, occurring in the later elements of the code (§§ 171-172, see below, p. 28), is the gift or settlement given by the bridegroom directly to the bride.

conduct is justified by the court, but she is entirely within her right in refusing intercourse with him. To be sure, the Babylonian-Assyrian law stopped short of a woman actually divorcing her husband; the privilege of divorce always remained with the husband, but it is a considerable advance for the woman to be permitted with the sanction of the court to leave her husband and have her marriage settlement or dowry returned to her. Now, in legal documents of the Hammurapi period, the old phrases "thou art not my husband" and "thou art not my wife" still occur in marriage contracts, with the stipulation in the former case that she is to be thrown into the river, and in the latter that the husband is to give his wife ½ mana of silver, precisely as in the Sumerian family laws[16]; and it is natural to find legal formulae surviving in legal usage after they have lost their original force. The significant feature, however, is that the code itself no longer uses these phrases in the paragraphs dealing with the relationship between husband and wife in case the marriage has resulted in issue. The code thus distinguishes between two conditions, (1) in case a woman has borne children to her husband and (2) in case she has not. In the former case (§ 137), the wife receives the marriage settlement and also an income from her husband's estate,[17] so as to be able to rear her children; and after the latter have reached their majority, the divorced wife receives a share, corresponding to that of one of her children, whereupon she is free to marry again whomsoever she chooses. If there is no issue to the marriage (§ 138), the wife receives her dowry (*tirḫatu*) and her marriage settlement (*šeriḳtu*) and in case there is no marriage settlement then one mana of silver (§ 139).

[16] e. g., *Cun. Texts* VIII, Pl. 7b. The practice, however, is not uniform. In Meissner, *Beiträge zum altbabylonischen Privatrecht* No. 90, 20, only 10 shekels of silver are given to the wife as the amount of her original dowry (lines 7-8), while *Cun. Texts* II, Pl. 44, 10-11, she is to be thrown from some eminence (An-Zag-Gar = *dimtu* "column," Meissner, *Seltene Assyrische Ideogramme* No. 4676), whereas the husband on divorcing his wife is to give up "house and contents" to his wife. Again in Poebel, *Legal Documents of the First Dynasty,* No. 48, 14-16, the wife stipulates that she is to receive ½ mana of silver in case of divorce by her husband, whereas if she says to her husband "thou art not my husband" she is to be shorn of her hair and sold. Such appears to have been the practice in Nippur.

[17] Literally "field, orchard and house," to indicate the entire real estate.

The social advance over earlier conditions, reflected in such provisions, is considerable. The husband can no longer put his wife away at will. If no blame attaches to her, a fair compensation must be given, not merely the half mana—calculated, presumably, as the average marriage settlement in earlier days,—but in case there are no children, also the dowry; or if there are children, then in lieu of the dowry, sufficient alimony to bring up her children and a share of her husband's estate, after the children shall have reached their majority.

The marital authority thus appears greatly curbed, corresponding to the restrictions put upon the exercise of parental authority. The advance from ½ mana to a whole mana of silver as the amount to be given to the divorced childless wife in case there is no marriage settlement may be taken as representing the growth in material prosperity in Hammurapi's days as against the simpler conditions in earlier days. It is also interesting to note that the provisions in the case of a concubine who has borne children to her master are identical as in the case of the chief wife (§ 137).

The old Sumerian family laws give the power of absolute divorce to the husband, without distinction whether there are children or not, whether the woman has done wrong or is entirely innocent. Hammurapi's code not only makes a distinction between the childless wife and the one who has borne children to her husband, but permits the absolute divorce without compensation only in case of guilt on the part of the wife, or as the phrase runs (§ 141) "if she has determined to go about acting foolishly, destroying her house, (and) neglecting her husband." In that case the husband may simply say, 'I divorce her' and she goes her way empty-handed, while a supplementary provision,—in the form of a comment or an answer to a question raised—states that if he does not divorce her, he may nevertheless take a second wife and reduce the first one to the rank of maid. One cannot help suspecting that this supplement is more of the nature of a hypothetical case to provide for a possible contingency, but one that would not be likely to occur in the days of Hammurapi.

III.

We are fortunate in having, also, the evidence for the continued modification of legal practice after the compilation of the code which is thus shown not to have been the absolute

standard for all times without change or deviation, though to be sure, we must always bear in mind that according to the ancient conception of law as of divine origin, the underlying *principle* of a law once promulgated is never abandoned. A statute was an oracular decision—a *têrtu,* just as the corresponding Hebrew term *tôra* involved the "decree" of a deity. Hebrew theology was necessarily led to assume a divine revelation for its laws, simply because the Hebrews lived at one time on the same plane of thought as did their fellow Semites and their fellows of other ethnic groups in regarding the gods as the source of all law, with the priest or king acting merely as an intermediary or as the representative of the deity. Hence, the principle throughout antiquity and which passed down far beyond the borders of ancient history, was that law is fixed and immutable. As a divine decision it is infallible and in accord with this the Hammurapi code provides that the judge who errs or who alters an opinion once given—it is all one—is removed from office, besides being subjected to a heavy fine, since he thereby reveals himself as unworthy to speak in the name of an infallible god (§ 5). New applications of the law, however, may introduce *modifications,* without affecting the underlying principle. Changes in the status of society may entail even radical departures from an older practice without involving an actual abrogation of the old law itself. Cases must constantly have arisen in Babylonia and Assyria which necessitated an appeal to the court for a decision. That decision was always based on the existing law, but not infrequently the decision might seem to be so contrary to the original purport of the law as to practically overthrow it. So, for example, the principle that a man's wife and children belonged to him as part of his chattels was maintained in the Code of Hammurapi. According to this principle, he could sell his wife and children for debt, but in accord with what we have seen to have been a steady direction towards a restriction of parental and marital authority, the code provides (§ 117) that he can sell his wife, son or daughter for three years only; in the fourth year they must be given their freedom—a stipulation which changes the sale into an indenture for a limited period. Theoretically, however, the *right* to sell is maintained, despite the significant restriction in the practical execution.

From this point of view we must judge the deviation from the practice prescribed in the code that we encounter in a group

of laws found on a tablet of the British Museum to which Dr. Peiser first called attention.[18] Unfortunately, the tablet is in a very fragmentary condition, so that only a portion of it is intelligible. It belongs to a period far later than Hammurapi, though the imperfectly preserved condition of the fragment makes it impossible to fix an exact date. The tablet itself may have been an extract from a more complete code made for school purposes, though I am inclined to believe that the fragment is part of a complete code. The portion preserved affords an opportunity of instituting a comparison with certain sections in the Hammurapi code, with the result of showing supplementary regulations of considerable interest, as well as actual deviations in practice. A few illustrations must suffice. A paragraph stipulates that if a tablet regarding a field (i. e. a piece of property) exists, duly sealed in the name of some party, but a corresponding duplicate tablet as a document of authorization was not prepared, the one in whose name the one tablet is made out as the owner shall take the field or house. The provision is evidently a supplementary decision to § 7 of the Hammurapi code which states in general terms that any purchase made without witnesses and a formal deed (*riksu*) is invalid, in order specifically to provide that one copy of a regularly drawn up deed of sale or possession should be prepared, but not a duplicate, which must have become so common as to have been regarded as quite obligatory. The supplementary decision is in accord with the spirit of the older law that a *single* document, testifying to the ownership of a piece of property, suffices.

§ 153 of the code provides that in the event of the death of a childless wife, the marriage gift (*tirḫatu*) for the wife is returned to the husband, and the dowry given by the father of the wife reverts to the father. The other case of the husband dying before his wife without issue is not covered in the code. In supplementary fashion again the later code ordains[19] that the marriage gift belongs to the wife as well as the dowry to dispose of as she pleases; and in case there was no dowry, then the court fixes on an amount or proportion to the estate of the husband to be given to the widow. Similarly the following

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[18] *Jurisprudentiae Babylonicae quae supersunt* (Cöthen, 1890). See also Winckler, *Die Gesetze Hammurabis* (Leipzig, 1904), pp. 86-91.

[19] Col. IV, 8-24.

paragraph, making provision in the event of the death of a husband whose wife had borne him children supplements § 167 of the code—the case of the wife dying before the husband. The widow receives her dowry and any gift that her husband may have made to her—including, therefore, any special provision in his will; she may remarry and if there are children from the second marriage, the mother's dowry goes to the children of both marriages. According to the code, if the husband marries again and has children through the second marriage, the dowry of the first wife reverts to her children, and the dowry of the second wife to her children on the death of the father.

Such supplements clearly represent decisions in regard to cases as they arose, which were not specifically provided for in the code; and there was comparatively little difficulty in reaching a conclusion through the extension and application of the underlying principles of equity assumed in the code, but we also encounter direct deviations from the older practice in the later code, as e. g., the provision[20] that in case a man whose wife has borne him children marries again after his wife's death and has issue also from the second marriage, then upon the father's death, the sons of the first marriage receive two-thirds of the father's estate and those of the second marriage the remaining third, whereas according to the Hammurapi code (§ 167), the father's estate is divided equally between the offspring of both marriages.[21] Modifications of this nature point, as already suggested, to economic changes as well as to a social advance in the status of woman, whereby the wife becomes more than a mere possession of her husband, and leading to a preference being given to the children of the first marriage.

As a last illustration we may instance § 279 of the code which briefly declares that if a claim is made against a slave—male or female—who has been sold, the seller is made responsible for the claim. The later document (Col. II, 15-23) more specifically

[20] Col. IV, 32-43.

[21] The later code makes special provision for the daughters (Col. IV, 43 seq.), but the tablet is defective at this point; it presumably provided that the sons were to maintain their sisters till marriage and give them a dowry out of the paternal estate. Similarly, in all probabilities in the paragraph dealing with the division of the mother's estate among the children of her two marriages (Col. IV, 45 seq.), where again the tablet breaks off after the mention of the "sisters."

takes up the case of a female slave, and after providing that in the event of a justified claim the seller must return the full amount according to the deed of sale, (though not the interest,) adds that if in the interval between the sale and the claim, the slave has borne children, the latter must be purchased at the rate of 1½ shekels of silver for each child—apparently a merely nominal sum to establish the right of the claimant to the offspring of his slave, though also a recognition of his obligation to give compensation to the *ad interim* owner for the increased value of the possession restored to him.

IV.

The proof thus furnished for a steady modification in legal procedure and practice in Babylonia, and a modification on the whole in the line of a progress to more equable conditions, accompanying a gradual social advance, justifies us in applying the same method to the Hammurapi code as holds good for the Pentateuchal codes, with a view of differentiating *within* the code itself between older and later elements. The parallel can, I think, be carried further to an identity of the method by which the substratum in the case of the various Pentateuchal codes and of the Hammurapi code is amplified (a) through further specifications to provide for new cases that arise and (b) through amplifications of all kinds, representing in many cases answers to questions raised, in others an interpretation of an older law in a manner to adapt it to later circumstances. Elsewhere, I have shown,[22] that we can detect in the Pentateuchal codes the beginnings of that process which was carried out on a large scale in the Babylonian Talmud, to wit, the distinction between the law—the Mishna—and the commentary upon it—the Gemara—with this difference, to be sure, that in the Pentateuchal codes the discussions on the law are not given, but merely the decisions as an outcome of the discussions, or merely the answers to implied questions are set forth. Much in the same way we may by a careful study and analysis of the sections and subdivisions of the Hammurapi code, separate the "Mishna," as it were, from the "Gemara," the older statutes from the subsequent additions, the nature of which varies just as the additions do in the Pentateuchal codes. To

[22] "The So-called Leprosy Laws" in the *Jewish Quarterly Review*, New Series, Vol. IV, pp. 357 seq.

carry out the analysis in detail would carry us much too far; nor are we as yet in a position to pick out throughout the code the original substratum which forms the point of departure for the further growth of the code through a complicated process till it reached its final stage. All that can be attempted here is to justify by a number of examples the general thesis maintained that for a proper understanding of the code we must carefully differentiate between older and later elements.

In a general survey of the code we are struck by the fact that after some specific law is registered, special provisions are made for certain classes of the population, more particularly for the *Maš-En-Kak,* or *muškênu,* the general force of which as plebeian may now be regarded as certain.[23] So, for example, after setting forth (§ 139) that in default of a marriage gift to his wife (handed over to the father-in-law in trust), the husband in divorcing a wife who has not borne children to him, gives her one mana of silver, it is added (§ 140) that in case the husband is a *Maš-En-Kak,* or "plebeian," he gives only one-third of a mana. Again, after setting forth the *lex talionis* (§§ 196-197) that if one destroys the eye or bone of a man, the eye or bone of the one who inflicts the injury shall be destroyed, it is said that if it is the eye or bone of a plebeian, one mana of silver shall be paid (§ 198). Upon the law (§ 200)

[23] See Johns, *The Relations between the Laws of Babylonia and the Laws of the Hebrew Peoples* (London, 1914), p. 8. There are traces in the code of a period when the *muškênu* as belonging to a lower class was obliged to render service to the palace and possibly to the patricians or free nobles; or at all events he could be pressed into such service. Hence the term is sometimes used with an implication of such service. He is, however, essentially a freeman and if he sometimes appears as a 'free laborer' it is due to the position of a servitor which he formerly held and which naturally led to his being a 'laborer' after he had become entirely independent of both the king and of the *amêlu,* the "man" *par excellence,* who in the code occupies a higher grade than the *muškênu* and who in fact in contradistinction to the latter is originally the "patrician" (Johns, *ib.,* p. 8). It is rather interesting to note that whereas in the feudal system of the Middle Ages, the serf is the "man" of the lord, in ancient Babylonia the "man" is the nobleman. It should be noted, however, that the original force of "patrician" for *amêlu* has given way to a large extent in the code in favor of the more general conception of a free citizen in the full sense and without any restrictions, whereas the *muškênu,* although also a freeman, belongs to a lower class. Ordinarily, therefore, when not specifically contrasted to *muškênu,* the *amêlu* is the citizen and is to be rendered "man."

that if a man's tooth is knocked out, the tooth of the one who inflicts the injury is to be knocked out, we find (§ 201) that in the case of a plebeian, one-third of a mana of silver shall be paid. Here the substitution of a fine for a bodily punishment is in itself an indication pointing to a later decision. Similarly (§ 203) if a man strikes another, he is to pay one mana of silver, but if it is a plebeian (§ 204) only 10 shekels of silver. If the injured person dies (§ 207), the fine is ordinarily one-half of a mana of silver, but in the case of a plebeian one-third of a mana of silver. In the same way, special paragraphs (§§ 211-212, 216, 222[24]) provide fines for an injury to a pregnant woman who is the daughter of a plebeian, or for her death through a blow, for physician's fees, for an operation on an eye, or for a broken bone, supplementary to the provisions in the case of an *amêlu* being the offending or injured party. In all these cases, the paragraphs referring to the special class of citizens designated as *Maš-En-Kak* may safely be regarded as later elements, supplements to the law itself, embodying special decisions of the court for the class in question.

V.

The code recognizes palace or temple property (§§ 6, 8) including palace slaves (§§ 15, 16, 175, 176) as distinct from other property. Death is the general punishment for stealing temple or palace possessions (§ 6)—though in what again appears to be a later provision a return of thirty fold is stipulated in case the stolen object is an ox, sheep, ass, pig or boat—(§ 8). Death is also to be meted out to the one who aids a palace slave—male or female—to escape or who harbors such a slave in his house (§§ 15-16). We can understand such special provisions in view of the sanctity attaching to the temple as also to the palace because of the sacro-sanct position of the king; and no doubt such laws date from a very early period, but the same reasons do not apply to the *Maš-En-Kak*. If, therefore, we find the latter added in some cases, we are, I think, again justified in looking upon such an addition as a later element in the code, though naturally suggested because the "plebeian" in his capacity as one that could be pressed into

[24] In § 219 the term *warad Maš-En-Kak* appears to be an error for *warad amêlim*, as in § 223.

service[25] belongs in a manner to the palace. Such an addition appears in § 8 where it is stipulated that the theft of an ox, sheep, etc., from a "plebeian" entails a ten-fold return and, similarly, I have no hesitation in regarding the words "or the male slave of a plebeian or the female slave of a plebeian" in § 15 as a supplemental insertion to place the theft of such a slave on a level with the theft of a palace slave, male or female. The insertion is even more clearly revealed in § 16 which originally must have read as follows:

"If a man harbors in his house, be it a male or female palace slave who has escaped from the palace, and does not bring (the slave) forth at the command of the overseer (*nagiru*), the master of that house shall be put to death."

After the words "of the palace" (*ša ekallim*) the text has *u lu Maš-En-Kak* (literally "or a plebeian") which, to say the least, is awkwardly put. We should expect *lu ša ekallim lu ša Maš-En-Kak*. As they stand the words impress one as a gloss, inserted as a supplement to the text in order to make § 16 conform to § 15.

The two classes 'palace slaves' and "plebeians" (*Maš-En-Kak*) are again placed side by side in supplementary statutes (§§ 175-176, 176a) dealing with the status of the wife and children in case of a marriage between a palace slave or the slave of a plebeian and the daughter of a citizen of higher rank. The status of such slaves was clearly higher than that of ordinary slaves[26]; they could marry the daughter of free citizens and it is provided (1) that the owner of the slave has no claim on the children born of such a marriage for service, (2) that the dowry brought by the wife belongs to her after her husband's death, (3) that the property acquired in common by the slave and his wife shall on the death of the husband be divided into two equal parts, one-half going to the owner of the slave and the other half to the widow in trust for her children, and (4) that the same procedure, i. e., the division of the estate, is to be followed in case there is no dowry. The supplementary character of these statutes is self-evident; they represent decisions to apply to special circumstances to illustrate the application of the laws of inheritance to a woman who

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[25] Above, p. 12, note 23.

[26] We may conclude from these paragraphs that an ordinary slave could not marry the daughter of a free citizen.

marries a slave of higher rank. The recognition of such a marriage, not only as legal but apparently as entirely normal and proper, is in itself an indication of an advanced status accorded to palace slaves and to the slaves of a plebeian over ordinary slaves. The custom of such marriages must at some time before Hammurapi's days have become sufficiently common to necessitate special legal decisions, regarding the status of the wife and children.

I venture, therefore, to set up the thesis that the introduction of the *Maš-En-Kak* in the code represents in all cases a later element, prompted by economic changes, and that the special provisions for marriages with slaves of the palace or with slaves of plebeians similarly represent supplements to older sections.

VI.

There are two other classes for whom special regulations are introduced into the code,—the son of a *Ner-Se-Ga* (low birth) and the son of a *Sal zikru* (public woman)—and I venture to think that the paragraphs in which these are introduced likewise represent later elements. The *Sal zikru,* as already pointed out,[27] can hardly be anything else than a public woman or prostitute, and the juxtaposition suggests that the son of a *Ner-Se-Ga* must also be a child of doubtful parentage or at all events of low origin. The three references in the code to these two classes occur in the subdivision devoted to regulations regarding adopted children (§§ 185-194). The secondary or supplementary character of the three paragraphs (§§ 187, 192 and 193) becomes evident on a closer inspection of their position within the subdivision in question. The first law of the sub division (§ 185) stipulates that no claim can be brought for a child legally adopted and reared by a foster-father. To this, § 187, declaring that no claim can be brought against the son of *Ner-Se-Ga* who is taken for palace service, or for the son of a public woman is clearly a supplementary decision to include in the original law adopted children of doubtful parentage. Similarly, to § 186 providing that an adopted child may under certain circumstances return to his own father's house—an exception, therefore, allowed against the general law in § 185—there is added as a special and perfectly natural decision § 192

[27] See above, p. 4, note 12.

that in the case of the son of a *Ner-Se-Ga* or of a public woman, where no such exception seems reasonable, the bond of adoption cannot be annulled. To express this the code, as will be recalled,[28] introduces the language of the old Sumerian 'family laws,' and states that if such a son rejects his foster-parents, his tongue shall be cut out. An additional paragraph (§ 191) embodies the decision that if such a bastard finds out who his father was and, rejecting his foster-parents, goes back to his father's house, i. e., attempts to annul the bond of adoption, his eye shall be plucked out.

Reviewing, now, this subdivision dealing with adoption (§§ 185-194), we can trace the growth of the 10 paragraphs of which it consists without much difficulty.

The basis of the subdivision is formed by §§ 185-186, 190 and 191, setting forth (1) that no claim can be made for a minor legally adopted and reared by the foster-father, (2) that if after the adoption the child is offensive[29] to his foster-parents, he is to be returned to his father's house, (3) that if the foster-father does not reckon the adopted minor among his sons (i. e., does not give him an equal status), the child is to be returned to his father's house (i. e., resumes his status as the child of his own father), (4) that if after rearing the adopted child, the foster-father wishes to disinherit him, he cannot send him off empty-handed,[30] but must give him one-third of the portion of a son, to which a supplementary decision adds that the portion is not to be taken from the field, orchard or house, i. e., not from real estate, but presumably in cash or goods. After the first two paragraphs, there are three insertions, representing as I believe later elements, §§ 187, 188, 189, to wit, that (1) no claim can be brought for the son of a *Ner-Se-Ga* or of a public woman if legally adopted, (2) nor for a

[28] See above p. 4. "Thou art not my father," "Thou art not my mother."

[29] *i-ḫi-a-at* which Peiser (*Orient. Litteraturzeitung*, 1904, p. 236) wishes to take in the sense of 'prefers' (from *ḫâṭu*). That, however, would be in direct contradiction to the preceding paragraph. Something more than a mere preference must be assumed before an adopted child must be given up. Despite the difficulty of deriving *iḫiat* from *ḫaṭû* "sin," we must from the context conclude that the child has committed some offense against his foster-parents.

[30] *re-ku-su*, following Delitzsch (*Wiener Zeitschrift fuer die Kunde des Morgenlandes* XIX, p. 374).

child adopted by an artisan for the purpose of teaching him his trade but, (3) if the artisan does not teach the adopted child his trade, then the child may return to his father's house. Similarly, to the fourth and last paragraph (§ 191) of the original adoption laws, three further decisions are added, §§ 192, 193 and 194, two of these setting forth the law in regard to the adopted son of a *Ner-Se-Ga* or of a public woman who rebels against parental authority, or who finds his parentage and in a spirit of distaste for his foster-parents returns to his father's house, and the third providing that in the case of a nurse who without knowledge of the parents substitutes a child in place of the one given to her to nurse and which has died on her hands, shall have her breasts cut off. This supplemental decision smacks somewhat of the school—like some of the purely theoretical and hypothetical instances in the later additions to the Pentateuchal codes—though it is, of course, possible that cases of substitution may have occurred with sufficient frequency to warrant a special decision; it is placed here because it involves an involuntary adoption through a fraud practiced on the unwilling foster-parents.

VII.

We are in a position by a similar analysis to separate between older and later elements in the code in §§ 195-227 which form a group dealing with the *lex talionis.* A comparison with the various forms of the law in the Pentateuchal codes furnishes an aid in the analysis, as it on the other hand justifies the attempt to separate between older and later elements in the section of the code in question. In the oldest of the Pentateuchal codes (Ex. 21, 23-25) the law reads, "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, blow for blow." The form in the code of Holiness, however, (Lev. 24, 21) "break for break, eye for eye, tooth for tooth" shows that in the Book of the Covenant we have an artificial expansion by a number of additions. Deuteronomy 19, 21 is clearly dependent upon the form in the Covenant code "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." The form in the code of Holiness may, therefore, be regarded as the oldest and presents a clear parallel to §§ 196-201 of the Hammurapi code where in suc-

cession, eye, bone[31] and tooth are dealt with. Within these six paragraphs forming a subdivision of the section we can pick out §§ 196, 197 and 200 as older, with the remaining ones as supplements. These three paragraphs read

"If a man destroys the eye of another, they shall destroy his eye.

If one breaks a man's bone, his bone shall be broken.

If one knocks out the tooth of a man,[32] his tooth they shall knock out."

Between the paragraphs regarding the bone and the tooth, appear two supplemental decisions (§§ 198-199) in case the man whose eye or bone is injured is a *Maš-En-Kak* ("plebeian") or a slave. In the former case there is a fine of one mana of silver, in the latter one-half of his price. Similarly, after the paragraph about the tooth, another decision is given (§ 201), to wit, if it is the tooth of a *Maš-En-Kak* that is knocked out, the fine is one-third of a mana of silver. In order to be complete, we should have had a further paragraph setting forth the fine in case a slave's tooth is knocked out. We may perhaps assume that the fine was one-half the amount in the case of a *Maš-En-Kak,* or one-sixth of a mana of silver. These additions have suggested in § 200 (as well as in § 203) the addition of the word "of his own rank," (*meḫrišu,* or *ša kîma šu'âti*), anticipating, as it were, the supplementary decisions. The circumstance that this addition was not consistently added in the other paragraphs, viz. §§ 196 and 197, points to its being an afterthought, and incidentally further justifies the analysis here attempted.

There follows a section consisting of 13 paragraphs regarding blows (§§ 202-214) which would correspond to two of the additions in the code of the Covenant, "wound" (פֶּצַע) and "blow" (חַבּוּרָה). That the entire section in the Hammurapi code represents an amplification of the original paragraphs of the *lex talionis* follows from the punishments detailed which are tortures rather than exact equivalents for the injury done, or fines.[33] For all that, it would be carrying the analysis too far to assume that the amplification may not have formed a

[31] Ner-Pad-Du "bone" in the Hammurapi Code is the equivalent of *sheber,* "break" or "fracture," in the Code of the Covenant.

[32] The text adds, "of his own rank."

[33] An exception, however, is formed by § 210, where it is provided that if through a blow a pregnant woman has a miscarriage and dies, the daughter of the man who committed the assault shall be put to death.

part of the oldest substratum of the code. All that is maintained here is, that the section itself has its origin in an amplification of the *lex talionis* and is not of the same texture as the latter. The arrangement of the section shows a variation from the preceding one in so far as we have a logical sequence of four possible cases (§§ 202-205), (1) a man strikes another of superior rank on the cheek, (2) or one of his own rank,[34] (3) one of inferior rank strikes one of inferior rank, (4) a slave strikes a free man, the punishment being corporeal in the first and fourth instance, sixty strokes with an ox-tail and cutting off of the ear respectively, but fines in the second and third instance, one mana and 10 shekels respectively.

The code then passes on to more serious results than mere insult by striking another on the cheek. Here, again, the order is much the same as in the case of the *lex talionis*. Throughout it is assumed that the more serious injury was unintentional. Paragraph 206 deals with the case that the wound inflicted is sufficiently serious to necessitate medical treatment. The one who inflicts the wound swears that he did it without intent and pays the physician's fee. If the injured man dies (§ 207) as a result, the fine is one-half mana of silver to which a subsequent decision adds that if the victim is a plebeian, the fine is only one-third of a mana of silver. Blows inflicted on a married woman with subsequent miscarriage and possible death are then considered in six paragraphs (§§ 209-214), where again we first have two instances of the blow bringing about (a) merely a miscarriage, entailing a fine of ten shekels (§ 209), or (b) resulting in death (§ 210) in which case, since the *lex talionis* comes into play, the daughter of the man who inflicted the blow is put to death. Correspondingly, two paragraphs deal with the case that the victim is the daughter of a plebeian where the fine for a miscarriage is five shekels and for resulting death one-half of a mana. These instances are followed by two others, covering the case of the victim being a female slave with a fine of two shekels for miscarriage, and for resulting death one-third of a mana. The circumstance that the *lex talionis* is introduced in § 210 justifies us in regarding §§ 209-210 as belonging to an earlier period than the subsequent ones, apart from the other considerations already urged in the course of this discussion.

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[34] The expression here (§ 203) is *kîma šu'âti* as against *meḫrisu* in § 200—a further indication of an independent origin.

VIII.

The last subdivision, §§ 215-225, deals with physicians' fees for successful operations and with fines (and in one case bodily torture) for unsuccessful ones. The point of view is peculiar; it does not strike one as the outcome of the popular attitude towards the surgeon, but as a theoretical deduction of a legal nature, based on the analogy between a wound inflicted by an assault and the wound that the physician makes in the course of an operation. The same word *zimmu* for "wound" is in fact used in the paragraph (§ 206), forming (as we have seen) an original portion of the subdivision in regard to serious injuries as in the subdivision which we are now considering.[35] This term evidently forms the point of departure for adding to the section of the *lex talionis,* one dealing with wounds inflicted by a surgeon. This last subdivision thus turns out to be dependent upon the previous one, and it is fair to presume that the order also represents the chronological sequence. There are only two paragraphs in the subdivision that impress one as in keeping with an early and popular point of view regarding a physician's services, namely, §§ 218-219, the former providing that if a physician inflicts a severe wound with an operating knife which causes the man's death or destroys his eye, the surgeon's fingers shall be cut off; or if the victim be a slave,[36] then a slave of equal value must be given as a compensation. Here we have the *lex talionis* in its original vigor, and it may be, therefore, that these two paragraphs belong to the oldest stratum of the code, whereas the other paragraphs setting forth the physician's fees and in two instances money fines for unsuccessful operations are again due to considerations reflecting a later period. Whether the Babylonian state in actual practice went so far as to regulate physicians' fees is open to question at least, though in default of evidence one must be careful not to dogmatize. It is, at all events, interesting to note that in the many thousands of legal documents of all periods, not one has been found dealing with medical jurisprudence.

If the point of view here suggested is correct, §§ 215-217,

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[35] *zimmu kabtu* (§§ 215, 218, 219, 224, 225).

[36] The text, col. XXXIV, 85 reads, *warad Maš-En-Kak,* i. e., "the slave of a plebeian," but this cannot be correct. The general character of the subdivision demands *warad amêlim* as in § 223. See above, p. 12, note 24.

covering successful operations, belong to a later stratum than §§ 218-220. Three instances are as usual given, (1) the patient is an ordinary free citizen in which case the fee is ten shekels, if it is an operation that saves a man's life or his eye, (2) five shekels in the case of a plebeian and (3) two shekels in the case of a slave, to be paid by the slave's master. As a further and subsequent decision we have §§ 221-223 fixing the fee for setting a broken bone or for curing a sick man, five, three and two shekels respectively according as the patient is a free citizen, a plebeian or a slave. Again, § 220, stipulating that if a physician through an operation destroys a slave's eye one-half the value of the slave must be paid by the unhappy surgeon, is obviously a supplemental decision to the preceding paragraph setting forth that in the event of the death of the slave, another slave must be provided. The order here, therefore, is §§ 218, 219, 220, 215, 216, 217, 221, 222, 223.

Coming to §§ 224-225, the former setting forth a fee of one-sixth of the value of the animal[37] for a successful operation on an ox or ass, the latter obliging the veterinary to give one-fourth of the value if an unsuccessful operation causes the death of the animal, § 225 would again by analogy come first, but since the two paragraphs are clearly dependent upon the previous subdivision (§§ 215-223), indicated as such by the use of the same catch-phrase, *zimmu kabtu* 'severe wound'—the present order would be the one naturally adopted on this assumption. At all events, the two paragraphs represent supplementary decisions, extending the principle underlying surgical operations,—successful and unsuccessful,—from those performed on human beings to such as are performed on animals.

Finally § 195 reading: "If a son strikes his father, they shall cut off his fingers," now standing at the head of the entire subdivision, introducing the *lex talionis* and its manifold modifications, forms the connecting link between (a) the laws of adoption and of the limitation on parental authority, and (b) the laws of the *lex talionis*. The form of the paragraph

[37] Hardly one-sixth of a shekel, as Harper (*Code of Hammurabi*, p. 79) and others assume. The text merely says "one-sixth silver" and the omission of the word shekel suggests that one-sixth of the value of the ox or ass is meant, as against one-fourth of the value (§ 225) in case the operation is unsuccessful and causes death. The sign for *kaspu* "silver" may be a slip for *šimi-šu* as in §§ 199 and 225.

as a *quid pro quo* punishment, the hand that struck the blow being the one to be cut off, suggests that the law itself belongs to the oldest stratum of the code.

Summing up, the subdivision §§ 195-225 may be analyzed as follows. The starting-point is formed by (a) §§ 196-197 and 200, with § 195, as an application of the *lex talionis* to a specific case, and §§ 198-199 and 201 as supplements to §§ 196 and 200 respectively. Then come (b) §§ 202-214 as amplifications to the original *lex talionis,* dealing with slight injuries (§§ 202-205) and such as are serious (§§ 206-214) involving the possibility of death, within which section §§ 209-210 are older than the rest. A third section is formed (c) by §§ 215-225, dealing with physicians' fees for successful operations, and with punishments and fines for unsuccessful ones. In §§ 215-223, dealing with operations on human beings, §§ 218-219 are older with §§ 220, 215, 216, 217, 221, 222, 223 as supplements, while §§ 224-225 dealing with operations on animals represent the further extension of the principles set forth in §§ 215-223 and therefore still later.

IX.

Following the general line of argument here laid down, it is clear that in the next three subdivisions of the code (a) §§ 226-227, dealing with branding slaves illegally, (b) §§ 228-233, the fees for building operations and punishment for defective buildings and (c) §§ 234-240, boat hire with punishments for accidents, the bodily punishments (on the basic principles involved in the *lex talionis*) come first, whereas the substitute of fines and the decisions in specific instances constitute the later elements. From this point of view, the two paragraphs about the branding of slaves illegally, the punishment prescribed being the cutting off of the brander's fingers or even death by impalement[37a] under aggravated circumstances, bear the earmarks of very ancient laws, whereas the addition to the second paragraph that if the brander can swear[38] "I branded unwittingly" (i. e., without knowledge that he was doing or was asked to do an

[37a] So Johns in the *Amer. Journal of Sem. Lang.,* Vol. XXII, pp. 224-228.

[38] See Schorr in the *Wiener Zeits. f. d. Kunde des Morgenlandes,* Vol. XVII, p. 233 *seq.*

illegal act), he is released, is clearly a later decision in the direction of clemency under extenuating circumstances.

In the building laws, the principle of the *lex talionis* is again our guide in deciding that §§ 229-230, providing that in case a building collapses and causes the death of the owner, that the builder shall be put to death, and that if the son of the owner is the victim, then the builder's son suffers death, form the starting-point of this subdivision, with § 231, setting forth as a modified application of the principle of the *lex talionis* that if a slave is killed by the collapse, the builder must replace the slave,[39] as a later decision. Similarly, §§ 232-233, representing further specific cases of the collapse of a house or a wall without loss of life, belong to the later elements of the code, the fine involving merely the rebuilding of the house or wall at the architect's expense. Paragraph 228 at the head of this subdivision and § 234 at the head of the following subdivision (dealing with boat hire) and setting forth the *bonus*[40] for building a house or a boat are clearly later elements.

Within §§ 235-240 which have the appearance of being due to a more advanced state of society, the starting-point may be made with the first two, setting forth the laws in regard to accidents to a boat. If due to a careless builder the boat must be repaired or rebuilt by him, and if due to the careless handling of the one who hired it, the loss falls on the latter. Decisions in specific instances follow (1) if the boat sinks or the cargo is wrecked, because too heavily laden, the loss to be made good by the boatman, (2) if the boat sinks and is refloated in which case the boatman refunds one-half of the value of the boat as damages, (3) wages to boatmen for carrying cargo fixed at 6 gur of grain per year, (4) in case of collision with another boat, the boat going up stream being regarded as the one responsible because in a better position to avoid the accident. One need only thus summarize the decisions to make it clear that §§ 237-240 represent attempts to regulate applications of an underlying principle, with due concessions to changes in social relations. This would apply, particularly, to the endeavor to

[39] Instead of the slave of the builder being put to death, which would be the consistent application of the *lex talionis*, but which is set aside on the ground that a slave is a possession the loss of which must be made good.

[40] *kištu* "present."

establish a "minimum" wage (§ 239), reflecting a state of society that has left the age of the *lex talionis* long behind it,[41] retaining as the main trace of that age the principle of *quid pro quo* to fix damages as well as compensation.

X.

As the last illustration of the differentiation to be made between older and later elements in the code, let me take up an analysis of the subdivisions §§ 137-184, dealing with divorce, the status of concubines, the rights and obligations of the wife, incest, breach of promise on the part of the prospective father-in-law, dowries, marriage settlements, disinheritance and adoption of children of maid-servants, besides some miscellaneous though more or less cognate topics. These forty-eight paragraphs might all be grouped under family laws, though to be precise, §§ 127-136, dealing with adultery, slander of wife, wife-desertion,—voluntary or enforced through capture of the husband—ought to be added, as well as the subdivision §§ 185-194, regarding adoption and the like which we have already discussed.[42]

The general advance in the status of woman over earlier conditions has also been sufficiently emphasized as a feature of the code.[43] We may start out, therefore, with the general principle that the marital authority is no longer absolute. The wife who has borne children may still be divorced by her husband at his pleasure, but in addition to her dowry, she must be given a sum sufficient to bring up the children, and after they have reached their majority, she is to receive a portion of her husband's estate, equivalent to the portion of one of the children and after this, she may marry again whomsoever she chooses (§ 137). We may, however, put down as a later element in the code the protection of the wife who has a chronic disease (§ 148) and who may not on that account be divorced. The husband may take an additional wife, but he must support the sick wife as long as she lives and he cannot put her away, to which a supplementary decision adds (§ 149) that the sick

[41] If this view is correct, it would carry with it the later origin of such paragraphs as 228, 234, 242, 257, 258, 261, 268-277—all dealing with a minimum wage or money compensation.

[42] Above, p. 15 *seq.*

[43] Above, pp. 8 and 10 *seq.*

wife, if she so chooses, may take her dowry, and return to her father's house.

We may also regard as one of the later elements in the code the right of the wife to enjoy the use of field, garden, house or goods, i. e., real or personal estate, which her husband deeds to her (§ 150). Her children have no claim upon it after the husband's death, and she may dispose of it to a favorite child. The restriction, however, is added that she may not leave it to her brother, evidently to prevent the property or possession from passing beyond the domain of her husband's family. Such provisions, likewise, as, e. g., that husband and wife shall be conjointly responsible for debts contracted in partnership after marriage, but that neither is responsible (§§ 151-152) for the debts of the other contracted before marriage, reflect an advanced stage of conjugal relationship and are to be reckoned among the latest elements in the code.

On the other hand, the right of the woman to refuse to live with her husband if she has a distaste for him (§ 142), to practically divorce him and to receive her dowry provided no blame attaches to her, may well belong to the stage with which the code starts out. To the older elements we may also reckon such a provision as that a woman who brings about the death of her husband for the sake of another man shall be impaled (§ 153), as well as most of the laws of incest (§§ 154-158), which have all the earmarks of very early enactments, entailing as they do such severe and primitive punishments as expulsion from the city of the man who has known his unmarried daughter (§ 154), strangling for the man who has illicit intercourse with his married daughter (§ 155), the daughter being thrown into the river, and death by burning for the son who commits incest with his mother (§ 157). An exception is to be made, however, for two of the paragraphs. One of these (§ 156) provides a fine of one-half mana of silver for the father who has intercourse with his son's bride, but before the son has known her.[44] Here the fine as the punishment—an index of later practice—as well as the circumstance that the woman after receiving whatever may have been settled upon her may marry whom she chooses point to

[44] Note the severer punishment for incest with a married woman in accord with the general view of primitive society, which does not hold the unmarried woman as 'forbidden' to the same degree as the one belonging to a man.

supplementary decisions. The other stipulation (§ 158) that the son who "after his father," i. e., after his father's death,[45] has illicit intercourse with his father's chief wife (but who is not his mother), who has borne children, is to be disinherited, likewise impresses one as a subsequent decision, modifying the previous paragraph which prescribes burning for both in case of incest between mother and son.

Paragraphs §§ 159-164, dealing with breach of promise cases and with questions affecting the wife's dowry, are all of the nature of judicial decisions of a specific character, introducing complicated situations that are likely to arise only in advanced forms of society. One instance (§ 161) is indeed so complicated as to suggest the "academic" questions and hypothecated cases characteristic of the Jewish "Gemara." The situation presupposed in § 159 is that of a man already betrothed, who has given a marriage settlement for his wife to his prospective father-in-law, but who now finds that he prefers another woman. He forfeits the marriage settlement and that is all. The reverse case is taken up in § 160 of the father of the bride changing his mind, in which case the wound of the disappointed lover is salved by receiving back double the amount of the marriage settlement which he handed to his prospective father-in-law. Even these two cases have an 'academic' flavor, and this is certainly so in the following paragraph (§ 161), which assumes the transfer of the marriage settlement of the prospective father-in-law who then because of some slander against the prospective son-in-law, spread by a 'friend,'[46] changes his mind and says "My daughter thou shalt not have." The court decides as in the preceding paragraph that the rejected suitor is to receive double the amount of the marriage settlement, and also that the "friend" may not marry the girl. The purpose of the statute is clearly to thwart a possible conspiracy between the father of the girl and some rival or more desirable suitor with perhaps an offer of a larger marriage settlement, but the circumstances detailed impress one as a decision based on a hypothecated case rather than on some actual occurrence.

Paragraph 162, on the other hand, is a necessary provision, to wit, that if the wife dies before her husband her dowry belongs

[45] We find the same use of 'after' in the sense of 'after the death' in §§ 150 and 171.

[46] *Ibru,* "companion," "associate," etc.

to her children. The stipulation assumes a higher status for the wife, but no higher than the one underlying provisions that belong to the older elements of the code. Closely allied to § 162 is § 167, that in case a woman dies and her husband marries again and has children also from his second wife, after his death the dowries of the two wives are divided respectively among the issue of the two marriages, whereas the father's estate is lumped and divided equally among all the children. We have here again a supplemental decision; and this suggests that the intervening paragraphs §§ 163-166 are likewise supplemental to the main body of the section, based on various cases that might arise. The cases instanced in §§ 163-164 are (1) a woman dying without issue, whereupon the marriage settlement is returned by the father-in-law, whereas the dowry reverts to the latter's estate; (2) in case of failure of the father-in-law to return the marriage gift, the husband is permitted to deduct the amount from the dowry to be returned, which perhaps warrants us in concluding that the dowry was ordinarily larger than the marriage settlement. The following two paragraphs §§ 165-166 introduce entirely new matter without connection with what precedes or follows and likewise in the form of judicial decisions and inserted at this point as the most appropriate place. The resulting break in the context confirms the supposition that the two paragraphs in question are later decisions than §§ 162, 167, 163 and 164. The former (§ 165) assumes the case that the father formally presents real estate to a favorite child. The court decides that after the father's death this special gift is not to be deducted from the share falling to that child. The case has a somewhat 'academic' flavor, as has also the following one (§ 166), providing that if the father dies before his youngest son marries, on the division of the estate a portion shall first be set aside as a marriage settlement to be at the disposal of the youngest son, after which the balance of the estate is to be divided equally.

Paragraphs 168-169, curbing the parental authority in disinheriting a son, have already been discussed,[47] and we have seen that the former forms part of the original code, while the latter is a supplemental decision.

In the following subdivision, §§ 170-177, we may pick out §§ 173-174 as belonging to the older elements of the code, setting

[47] Above, p. 3 *seq.*

forth that in case a woman marries twice and has issue from both marriages, her dowry is to be divided among both sets of children but in case there are no children of the second marriage, the children of the first husband receive the entire dowry.

Paragraphs 175-176A introducing special decisions for the palace slaves and for the slave of a plebeian who marries the daughter of an ordinary free citizen have already been considered[48] and reveal themselves as later elements, while § 177 is clearly a still later decision which has a special interest because we have a legal document of the days of the 1st dynasty of Babylon, illustrating the application of the law.[49] It is the case of a widow whose children are minors and who wishes to marry again. She must go to court, have the husband's estate formally transferred to herself and to her second husband in trust for her young children. Supplemental decisions, embodied in the paragraph, provide that the estate of the deceased husband may not be disposed of and that he who forecloses the household goods of a widow with minor children forfeits his claim. Similarly, §§ 170-171 may safely be put down as later elements of the code, providing that a man may legitimatize the children of a maid-servant, in which case these children share equally with the other children in the ultimate division of the estate. Such a decision points to a further development in the direction of improving the status of those who ordinarily occupy an inferior social rank. In line with this, it is further provided that if the children of the maid-servant are not legitimatized by the father, nevertheless upon the latter's death the maid and her children receive their freedom, the children of the main wife having no claim on them.

Then follows in the same paragraph (§ 171) a stipulation which has no direct connection with what precedes. It joins on to § 162, setting forth the law in case the wife dies before her husband. As the complement to that paragraph, it must have read originally as follows:

["If a man takes a wife and she bears him children and that man die], the wife shall receive the marriage settlement and

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[48] Above, p. 14.

[49] See Meissner, *Beiträge zum altbabylonischen Privatrecht* No. 100, and Cuq, in *Revue d'Assyriologie,* VII, p. 94.

any other gift formally deeded to her by her husband (cf. § 150) and she may remain in her husband's house and enjoy it as long as she lives.''

To this a further supplemental decision is added, restraining the wife, however, from disposing of the property which after her death belongs to her children. To be sure, the paragraph in which this law is inserted treats of the case where the husband dies before his wife, but since in its first part, the purpose of the paragraph is to indicate the law in the event of a man not legitimatizing the children borne to him by his maid, the addition points directly to considerable manipulation on the part of the compilers of the code to bring older and later elements into proper connection. On this supposition that the code contains by the side of many old laws, a large number of later enactments and that these are further supplemented by still later decisions, we can account for such a displacement as is here pointed out and which carries with it that § 150—closely allied to the last part of § 171—and in no direct connection with what precedes and follows, was also misplaced in the shuffling incident to the endeavor to combine the old with the new.

Paragraph 172 provides that if the husband dies before his wife and had not given a marriage settlement, the widow receives in addition to her dowry, a portion of her husband's estate, corresponding to that of one of the sons. As a further protection to the widow, it is stipulated in what again appears to be a supplemental decision, somewhat ''academic,'' if not wholly so, that if her children attempt to drive their mother out of the house, the court inquires into the circumstances and if it transpires that she has done no wrong, the children are enjoined from maltreating their mother. If, however, the mother wishes to go, she may do so and, after leaving the marriage settlement to her children, may take the dowry (which came to her from her father) and marry again whom she pleases.

XI.

The last section (§§ 178-184) in this extensive subdivision which we are considering deals with questions of dowry for special classes, namely, (1) for the Nin An-Sal, i. e., the *êntu*

or votary of a goddess,[50] (2) the *Sal zikru* or public woman, (3) the Nu-Gig = *ḳadištu,* (4) Nu-Bar = *zermašitu,*[51] (5) *šugetu* "concubine" and (6) the Sal Marduk or votary of Marduk. In accordance with the line of argument above set forth, I have no hesitation in regarding such paragraphs embodying special legislation as later elements, precisely as in the case of paragraphs dealing with the application of a law to the "plebeian" or to the palace slave. The external form of the paragraphs, particularly that of the first very elaborate and cumbersome one, and upon which most of the others depend is a further proof of the later origin of this section; and the nature of the decisions bears out the conclusions to be drawn from the form. It argues for an advanced state of society that not only the rights of daughters are safeguarded, but that special provisions were made for those towards whom in an earlier stage of society no obligations were felt. The differentiation between a woman in the service of a god and one in the service of a goddess, and between these two classes and the woman in the service of Marduk, as the head of the pantheon all point in the same direction, as does the fact that the dowry is looked upon in these paragraphs as the *right* of the daughter, accorded to her even if she does not marry.

The first two paragraphs (§§ 178-179) deal with certain restrictions in regard to this dowry, formally deeded to the 'votary' or to the 'public' woman. The father may or may not add in the deed the words "to be given to whom she pleases on her death." If the clause is not added, then after the father's death, the brothers may take back real estate given to their sister and offer her in exchange "grain, oil and wool," i. e., merchandise corresponding to the value of her share of the estate. The evident purpose of such a provision was to prevent real estate from passing out of the family. In default of her brothers doing this, she may lease the property, supporting

[50] There are two classes of such votaries, (1) Nin-An (or Nin-Dingir)—in one instance Sal Nin-An (§110)—who is in the service of a god and therefore a sacred prostitute and (2) Nin-An Sal in the service of a goddess and therefore allowed to marry.

[51] The Nu-Gig or *ḳadištu* is the one who keeps herself secluded (Dhorme, *Revue d'Assyriologie* XI, p. 106 seq.), more like our conception of a nun; the Nu-Bar, or *zermašitu* ("neglecting seed"), is the woman who vows herself to chastity.

herself thereby, and enjoy anything else that her father has given her as long as she lives, but upon her death the heritage of the unmarried woman belongs to her brothers. If the father, however, specifically gives his daughter the right to dispose of her dowry, her brothers have no claim and she may leave her property to whom she pleases. Special cases are then taken (§§ 180-182), (1) of a father dying without giving a dowry to his daughter—a bride or a public woman—in which case she receives as her share of the estate a son's portion but, in accordance with the principle underlying § 178, after her death the share reverts to her brothers, (2) the Nu-Gig (or *ḳadištu*) and Nu-Bar (or *zermašitu*), dedicated by the father to the service of a god who receives only one-third of a son's portion, likewise reverting to the brothers upon her death, (3) an exception, however, in the case of a votary of the god Marduk, who may dispose of the one-third of a son's portion as she pleases. Presumably the sum went to the church.

Of particular interest are the two last paragraphs (§§ 183-184), giving the decisions, on the basis of the same principle as in §§ 179-180, for the daughter who becomes a concubine, receiving or not receiving her dowry during her father's lifetime. It would seem that according to the older practice, the father was not *obliged* to give his daughter a dowry. The later practice aimed to wipe out all distinctions among the daughters and, accordingly, it is stipulated that if the daughter who becomes a concubine does not receive a dowry, then after the father's death, the brothers must give her one proportionate to the father's estate and provide a husband for her; if she receives her dowry she has no further claim on the estate. Clearly these two paragraphs represent later decisions based upon earlier ones as embodied in the preceding paragraphs.

To sum up, in the subdivision §§ 137-184, the following represent older elements,—137, 138, 142-147, 153, 154, 155, 157, 162, 167(?), 168, 173 and 174; the remainder the later elements, with further subdivisions into such as may be looked upon as older supplemental decisions and such as represent still later decisions or illustrations of applications of older elements or supplemental decisions to specific cases, with some of these additions partaking largely or wholly of an 'academic' character—hypothetical instances, rather than actual occurrences.

XII.

It may not be possible for us ever to be able to trace the process involved in a gradual evolution of the code in detail, but the illustrations adduced will suffice, I trust, to show that it is possible to distinguish within the code between (a) older laws carried over from an early period and (b) additions in the form of new laws based on the same ancient principles, but representing adaptations to more advanced conditions, and (c) judicial decisions, setting forth the legislation for special classes or for special circumstances that actually arose or that might arise. In short, we must look upon the code as we do on the Pentateuchal codes and on the smaller subdivisions to be distinguished within the larger ones of these codes, as the result of additions of all kinds made at various times, with further differentiations within these additions between actually new decisions modifying the former practice, and mere interpretations of the older law at times through a consideration of the various complications that might arise. What I have attempted here is merely a beginning, an indication of the point of view from which the code should be considered in order to penetrate beneath the mere surface indications, and a suggestion of the method to be followed.

The older elements in the code are represented by §§ 1, 2, 3, 5, 6, 7(?), 14, 17, 19, 21, 22, 25, 26, 33, 34, 42, 43, 53, 55, 59, 60, 65, 103, 104, 108, 109, 110, 113, 117, 119, 121, 122, 124, 127, 128, 129-133A, 137, 138, 142-147, 153-155, 157, 162, 167(?), 168, 173, 174, 185, 186, 190, 191, 195, 196, 197, 200, 209, 210, 218, 219, 226-227, 229, 230, 235, 236, 241, 244, 245, 246, 249, 250, 253, 262(?), 263, 266, 267, 278, 279, 282, i. e., roughly speaking, about one-third of the preserved portion of the code represents earlier elements, while the remainder may with more or less probability be regarded as of later origin, or as decisions and special applications based on the older general laws. Making full allowance for legitimate differences of opinion in regard to some of the paragraphs and for errors in regard to others, enough and more than enough remains, I venture to think, to establish the main thesis for which I am contending, which is probable also on *a priori* grounds, that the code of Hammurapi is the culmination of a long antecedent process of gradual growth, combining, therefore, older with later elements.

Let me, in conclusion, emphasize that the thesis here proposed of differentiating between older and later elements in the code has nothing in common with the theory of a hypothetical *Urgesetz,* as set forth some years ago by the late David Henrich Müller,[52] from which both the Hammurapi code and the Pentateuchal codes are derived and of which Müller even wanted to see traces in the Twelve Tables of Roman legislation. The hypothesis has not met with acceptance by scholars, and it rests on what appears to be an erroneous view of the development of ancient law and of legal procedure. Law is steadily progressive; it grows by accretions, representing established practice and decisions rendered as new circumstances arise, and it is of the nature of this process that the old is carried over into the new. An *Urgesetz,* however, from which a later code is compiled assumes a sharp break between the old and the new; it replaces the process of steady unfolding by an artificial device for which, moreover, there is not the slightest evidence. The only aspect of Müller's hypothesis which stands is its starting-point that we must look upon the Hammurapi code as representing a culmination. As such we are, I think, justified in the attempt to separate the old from the new, just as on the other hand the code itself, as I have tried to show, forms the point of departure for further growth in both procedure and decisions; and we must assume this process to have gone on as steadily after the time of Hammurapi as in the period before the great compilation of the old and the new, undertaken at the instance of the wise ruler. The significance of the code lies in this fact, that it marks the end of one era and the beginning of another. In so far as old laws are never entirely abrogated and the underlying principles always maintained, the code no doubt formed a norm and standard for future days as Hammurapi had hoped it would, but in so far as conditions were constantly changing and new situations arose through the endless combinations of the particles in the kaleidoscope of human society and of human relationships, the code was subject, also, to constant modifications.

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[52] *Die Gesetze Hammurabis und ihr Verhältniss zur Mosaischen Gesetzgebung sowie zu den xii Tafeln* (Vienna, 1903), p. 210 seq. and 240 seq.